

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ANDY FABER,

Plaintiff,

v.

TERRANCE SMITH,

Defendant.

CASE NO. 1:19-CV-24

HON. ROBERT J. JONKER

ORDER AFFIRMING MAGISTRATE JUDGE'S DECISION
AND
APPROVING AND ADOPTING
REPORT AND RECOMMENDATION

1. Appeal of Magistrate Judge's Decision

Plaintiff appeals Magistrate Judge Carmody's Order denying Plaintiff's Motion for Recusal (ECF No. 52). In considering an appeal of a magistrate judge's ruling on a non-dispositive pre-trial motion, the Court applies a "clearly erroneous or contrary to law" standard of review. *United States v. Curtis*, 237 F.3d 598, 503 (6th Cir. 2001) (citing *United States v. Raddatz*, 447 U.S. 667, 674 (1980)); accord *Brown v. Wesley's Quaker Maid, Inc.*, 771 F.2d 952, 954 (6th Cir. 1985) (citing 28 U.S.C. § 636(b)(1)(a); see also FED. R. CIV. P. 72(a) (providing that district judge must consider timely objections to non-dispositive pretrial orders of magistrate judge and modify or set aside any part of order that is clearly erroneous or is contrary to law). A finding is "clearly erroneous" when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, North*

Carolina, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Magistrate Judge’s denial of the motion to recuse is not clearly erroneous. To the contrary, it is entirely proper. Plaintiff identifies nothing in the record or any legal authority that would support recusal.¹ The Magistrate Judge’s Order (ECF No. 52) is **AFFIRMED**.

2. Report and Recommendation

The Court has reviewed Magistrate Judge Carmody’s Report and Recommendation in this matter (ECF No. 53) and Plaintiff’s Objection to the Report and Recommendation (ECF No. 57). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, “[t]he district judge . . . has a duty to reject the magistrate judge’s recommendation unless, on de novo reconsideration, he or she finds it justified.” 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 3070.2, at 451 (3d ed. 2014). Specifically, the Rules provide that:

The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation itself; and Plaintiff’s Objections. The Court finds the Magistrate Judge’s Report and Recommendation, which recommends granting Defendant’s motion to dismiss and denying Plaintiff’s motion for summary judgment factually sound and legally correct.

¹ The Court notes that the Plaintiff mischaracterizes the record in his papers.

The Magistrate Judge carefully and thoroughly considered the record, the parties' arguments, and the governing law. Plaintiff's objections do not address the Report and Recommendation in any persuasive way. To the extent Plaintiff objects that dismissal of the case will set a precedent "that federal probation officers, while acting under the color of federal and state law, can break federal and state law[,]" Plaintiff is simply mistaken. Nothing in Plaintiff's objections changes the fundamental analysis in the case. Plaintiff is not entitled to summary judgment in his favor, and res judicata bars Plaintiff's claims, for precisely the reasons the Report and Recommendation details.

ACCORDINGLY, IT IS ORDERED:

1. The Magistrate's Judge's Order denying motion for recusal (ECF No. 52) is **AFFIRMED**.

2. The Report and Recommendation of the Magistrate Judge (ECF No. 53) is **APPROVED AND ADOPTED** as the opinion of the Court.

3. Plaintiff's Motion for Summary Judgment (ECF No 38) is **DENIED**.

4. Defendant's Motion to Dismiss (ECF No. 34) is **GRANTED**.

5. For the same reasons that the Court dismisses Plaintiff's claims, the Court discerns no good-faith basis for an appeal within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997) (overruled on other grounds by *Jones v. Bock*, 549 U.S. 199 (2007)).

This case is **CLOSED**.

Dated: November 1, 2019

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE